UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

HOWARD BURGESS,

Respondent.

HUDALJ 95-5023-DB
Decided: May 10, 1995

Kyle R. Riem, Esquire
For the Respondent

Luke H. Brown, Esquire
For the Government

Before: Robert A. Andretta
Administrative Law Judge

## INITIAL DETERMINATION

### Statement of the Case

This proceeding arose pursuant to 24 C.F.R. Part 24, Subpart G. On November 10, 1994, Nicholas P. Retsinas, the Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD"), notified Respondent Howard Burgess that, to protect the public interest, consideration was being given to debar him from further participation in primary covered transactions and lower tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a three- year period from the notice date. In addition, pending final determination of the debarment, Respondent was suspended from further participation in such transactions and contracts. The basis of the suspension and proposed debarment was that Respondent had been held jointly and severally liable, under the False Claims Act
(31 U.S.C. §§ 3729-3733), by the U.S. District Court for the Eastern District of Michigan.

By letter dated November 30, 1994, Respondent appealed the proposed debarment and requested a hearing.[1] Because HUD's action is based solely on a civil judgment, the hearing in this case is limited by 24 C.F.R. § 24.313(b)(2)(ii) to the submission of written briefs and documentary evidence. On January 4, 1995, I issued a Notice of Hearing and Order which established a schedule for the filing of such briefs and evidence. In compliance with that Order, the Government filed its Brief in Support of Debarment ("Government's Brief") on January 30, 1995, and Respondent timely filed his Brief in Opposition to Government's Proposed Debarment ("Respondent's Brief") on February 21, 1995.

## Findings of Fact

1. Respondent is the owner of the premises located at 2018 Fenton Road, Flint Michigan ("the Fenton Road property"). At all times relevant to this proceeding, he employed Gilbert Realty Co. Inc. ("Gilbert Realty") as the managing agent of the Fenton Road property. Gilbert Realty acted as Respondent's agent in the collection of rent, maintenance and management of the Fenton Road property and in interactions with the Flint Housing Commission ("FHC"), a Public Housing Authority ("PHA"). G.Ex. A, ¶¶ 1, 3, 4.[2]

2. From August 1987 to July 1992, June E. Smith was a tenant at the Fenton Road property. Her tenancy was pursuant to the Section 8 Existing Housing Certificate Program ("Section 8 Program"). The Section 8 Program was instituted by the federal government to assist low-income families in obtaining decent and affordable rental housing. Under the Section 8 Program, HUD enters into an annual contribution contract ("ACC") with a PHA, and the PHA enters into a HUD-approved contract, referred to as a housing assistance payments contract ("HAPC"), with the landlord of an existing property. Pursuant to the HAPC and using funds distributed by HUD, the PHA makes

[1] In the November 30, 1994 letter, Respondent did not expressly appeal and request a hearing on the suspension. *See* 24 C.F.R. § 24.412. In any event, because, as discussed *infra*, cause for debarment exists, cause for suspension also exists. *Id*. at § 24.405.

[2] Citation to "G.Ex." refers to an exhibit to the Government's Brief. "R.Ex." refers to an exhibit to Respondent's Brief.

monthly housing assistance payments to the landlord on behalf of an eligible tenant. The HAPC may provide that the tenant pay rent in addition to the housing assistance payments, but only if the monthly housing assistance payments paid by the PHA are insufficient to pay the landlord the entire HAPC rent

as computed by the PHA in accordance with HUD guidelines. After the rent is set and the PHA and landlord sign the HAPC, the tenant signs a lease which must be approved by the PHA. G.Ex. A, ¶¶ 1, 8-23.

3. For the period of August 1987 through March 1992, the FHC set Ms. Smith's HAPC rent at $300 per month. During that period, the entire amount was paid directly to Gilbert Realty by the FHC.[3] The FHC, the HAPC, the lease, and all addenda, represented that Ms. Smith had no monthly tenant rent obligation under the contract. Nevertheless, Respondent and Gilbert Realty demanded that she pay additional "side rent" payments. From August 1987 through August 1990, Ms. Smith paid an additional $25 per month, for a total of $925. From September 1990 to October 1991, she paid an additional $50 per month, for a total of $700. Consequently, during the period of August 1987 through October 1991, Ms. Smith paid a total of $1,625 in side rent payments.[4] G.Ex. A, ¶¶ 24-38.

4. On October 1, 1992, Ms. Smith filed a Complaint as a Qui Tam plaintiff in the United States District Court for the Eastern District of Michigan, Southern Division ("District Court") against Respondent and Gilbert Realty, jointly and severally. The action was brought under the False Claims Act and the Michigan Consumer Protection Act. The Complaint alleged that Respondent and Gilbert Realty violated the law by making false claims and representations concerning the collection of unauthorized rent payments from Ms. Smith in addition to rent approved and paid by the federal government on Ms. Smith's behalf. G.Ex. A. In its Final Judgment dated February 3,

[3]According to the Complaint filed with the District Court, the FHC paid Gilbert Realty a $357.00 retroactive rent adjustment which compensated Gilbert Realty and Respondent for apparently underpaid HAPs for the period of September 1990 through March 1992. *See* G.Ex. A at ¶ 28.

[4]The Complaint filed with the District Court further alleged that after October 1991, Gilbert Realty and Respondent continued to demand side rent payments of $50 per month, but Ms. Smith refused to make such payments. *See* G.Ex. A at ¶ 34.

1994, the District Court found Respondent and Gilbert Realty jointly and severally liable under the False Claims Act for $1,630 in damages, trebled under the Act to $4,890, and for seven civil penalties of $5,000, for a total of $35,000 in civil penalties.[5] G.Ex. B.

[5]As the parties had satisfied the terms of a Stipulation and Order, the District Court dismissed the Complaint insofar as it alleged violations of the Michigan Consumer Protection Act. *See* G.Ex. B.

## Discussion

1. Jurisdiction

Respondent argues that he is not subject to debarment pursuant to 24 C.F.R. Part 24 because he is not a participant as defined in the applicable HUD regulations.[6] In making this argument, Respondent considers it dispositive that although he owned the Fenton Road property, it was Gilbert Realty which entered into the HAPC with FHC. The fact, according to Respondent, that he "merely" and "indirectly" received rent "vis-a-vis" his agent, Gilbert Realty, does not satisfy the definitional requirements of HUD's regulations. In other words, Respondent argues that the Government does not have jurisdiction over him. That argument is without merit.

The applicable HUD regulations governing debarment provide that they

> apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as *covered transactions*.

24 C.F.R. § 24.110(a) (emphasis in original). A "participant" is defined as:

> Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

*Id*. at § 24.105(m).

Consistent with fundamental principles of agency law, the definition of "participant" encompasses a person, such as Respondent, on whose behalf an agent has taken part in a federal nonprocurement program. As the owner of the Fenton Road

[6]Respondent also argues that he is not a "principal" as defined in the applicable HUD regulations. Having concluded, *infra*, that Respondent is a "participant," I need not reach whether he is also a "principal" as defined in 24 C.F.R. § 24.105(p).

property at which Ms. Smith resided as a Section 8 Program tenant, Respondent

received HUD-funded rent from the FHC. Although Respondent, himself, did not execute the HAPC with FHC, as well as the related lease agreement and addenda, the contract and other agreements were executed on his behalf by his agent, Gilbert Realty. As such, Respondent is a "participant" under the applicable HUD regulations, and jurisdiction lies.

2. Cause for Debarment

Pursuant to HUD regulations, a debarment may be imposed, *inter alia*, for:

> (a) Conviction of or civil judgment for:
>
> * * *
>
> (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice. . . .

*Id*. at § 24.305(a)(3). While the agency proposing debarment has the burden of proving cause for debarment and cause must be established by a preponderance of the evidence, where the debarment is based upon a civil judgment, the standard is deemed to have been met. *See id*. at § 24.313(b)(3), (4).

As stated above, the Complaint upon which the District Court issued its Final Judgment alleged that Respondent and Gilbert Realty violated the False Claims Act by making false claims and representations concerning the collection of unauthorized rent payments from Ms. Smith in addition to rent approved and paid by the federal government on Ms. Smith's behalf pursuant to the Section 8 Program. Such a civil judgment falls squarely within the parameters of 24 C.F.R. § 24.305(a)(3).[7] Accordingly, cause for debarment has been established.

[7]The Government also seeks to establish cause under 24 C.F.R. § 24.305(a)(1). Having concluded that cause exists to debar Respondent under § 24.305(a)(3), I need not address the applicability of § 24.305(a)(1).

3. The Period of Debarment

Having concluded that cause for debarment exists, I turn to consideration of the appropriate period of debarment. As stated in the HUD regulations:

> The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

24 C.F.R. § 24.300. Thus, in determining the appropriate period of debarment, the sanction should be viewed in the context of its intended purpose.

The purpose of debarments imposed by agencies of the federal government is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. *Id*. at 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. 24 C.F.R. § 24.115(b).

"Responsibility" as defined includes integrity, honesty, and the general ability to conduct business lawfully. *See id*. at § 24.305; *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See Agan*, 576 F. Supp at 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

HUD's regulations require that the period of debarment be "commensurate with the seriousness of the cause(s)." 24 C.F.R. § 24.320(a). Generally, the period of debarment should not exceed three years; however, where circumstances warrant, a longer period of debarment may be imposed. *Id*. at § 24.320(a)(1). Moreover, a respondent has the burden of proof for establishing mitigating circumstances. *Id*. at § 24.313(b)(4). If a suspension precedes a debarment, the regulations require that the suspension period be considered in determining the debarment period. *Id*. at § 24.320(a).

The acts for which Respondent was held civilly liable under the False Claims Act

are very serious and are indicative of a lack of present responsibility, and thereby demonstrate that Respondent poses a risk to the government were it to do business with him in the future. To demonstrate factors in mitigation, Respondent asserts that he "is merely guilty of passive negligence" and that "[t]he real actor subject to debarment is Gilbert [Realty]." Respondent's Brief at 8. According to Respondent, he "is not an individual that the public needs to be protected from, in fact, he is a jolly older gentleman who speaks from the heart." In Respondent's view, his "only mistake was the hiring of a sloppy, incompetent property manager to act as his agent at the . . . Fenton Road [property]. . . . *Id*. Thus, Respondent asserts:

> Without minimizing the seriousness of the fraudulent collecting of additional "side rent" by Brian Gilbert [of Gilbert Realty], which eventually filtered to Respondent, the underlying facts, as viewed in totality, indicate that the seriousness of Respondent's omissions in failing to keep a closer eye on Brian D. Gilbert do not mandate Respondent's debarment.

*Id*. at 9.

The explanation offered by Respondent does not militate against a significant period of debarment. Instead, for several reasons, it demonstrates precisely why a significant period of debarment is warranted. First, Respondent fails to adequately and directly explain how his agent collected *and passed on to him* unlawful side payments without his knowledge or involvement. Second, even if Respondent's conduct with regard to Ms. Smith and the Fenton Road property could be attributed to nonfeasance rather than misfeasance, the fact remains that Respondent's participation in the Section 8 program was marred by repeated falsehoods. Thus, even if it could be concluded that a lackadaisical attitude alone accounted for Respondent's conduct, such indifference is demonstrative of the type of slipshod, imprudent business judgment which compels protection of the public interest. Finally, the tenor of Respondent's explanation demonstrates that he has yet to accept responsibility for his unlawful conduct and, therefore, that there remains a likelihood that he will repeat such acts in the future.

As further evidence in mitigation, Respondent points to an action he has filed against Brian D. Gilbert and Gilbert Realty in a Michigan Circuit Court arising out of the events at issue in this proceeding. In that other action, Respondent alleges breach of contract, implied contractual indemnification, common law indemnification, breach of fiduciary duty, and gross negligence/willful misconduct. Respondent's Brief at 8, *citing* R.Ex. 1. Respondent also refers to an action he has purportedly brought against the attorney that represented him in the District Court proceeding. According to Respondent, that attorney also represented Brian D. Gilbert and Gilbert Realty, and as a result, he was

not provided an adequate defense and a conflict of interest was presented. *Id*. at 8-9. In support of his position, Respondent relies upon correspondence which he believes demonstrates that the attorney knew Brian D. Gilbert of Gilbert Realty was the party responsible for the events which led to the District Court proceeding. *Id*. Given Respondent's explanation that his actions with regard to the Fenton Road property are attributable to his own carelessness and the tenor of that explanation, the proceedings brought against Gilbert Realty and his former attorney, like the mitigating factors already addressed, do not obviate the imposition of a significant period of debarment.

Given the record as a whole, I conclude that a three-year period of debarment is warranted. A three-year period of debarment is commensurate with the seriousness of Respondent's conduct and is appropriate under the circumstances.

## Conclusion and Determination

Upon consideration of the entire record and the public interest, I conclude and determine that good cause existed to suspend Respondent pending the outcome of this debarment proceeding and that good cause exists to debar Howard Burgess from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD, for a three-year period from November 10, 1994.

_____

ROBERT A. ANDRETTA
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DETERMINATION AND ORDER issued by ROBERT A. ANDRETTA, Administrative Law Judge, HUDALJ 95-5023-DB, were sent to the following parties on this 10th day of May, 1995, in the manner indicated:

_____
Chief Docket Clerk

**REGULAR MAIL**:

Kyle R. Riem, Esquire
2331 Stonebridge Drive
Building E, Unit O
Flint, MI 48532

**INTER OFFICE MESSENGER**:

Luke H. Brown, Esquire
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., Room 10251
Washington, D.C. 20410

Nilda Gallegos - Docket Clerk
for Debarments and Suspensions
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., Room 10251
Washington, D.C. 20410

Richard A. Young, Acting Director
Participation and Compliance Division
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., Room 9166
Washington, D.C. 20410